No. 85-2102 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Date: August 11, 1986

Questions Presented

1. Is this case so exceptional as to warrant deviation from the general rule that the Supreme Court will not decide issues that were not pressed in, or determined by, the courts below?

2. Whether a fixed base operator, which is a member of the industry regulated by the federal aviation laws, may assert a private right of action under the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2210 ("AAIA"), or under the Civil Rights Act, 42 U.S.C. § 1983, for an alleged deprivation of rights under the AAIA, where that statute confers no enforceable rights and where, in addition, the AAIA is part of an intricate and comprehensive regulatory and enforcement scheme, which explicitly provides for private remedies only in certain cases, not including the one at issue here?

3. Whether New York's General Municipal Law §§ 350-357 (McKinney 1986), which permits municipal airport operators to enter into exclusive lease arrangements, is void on its face as being in violation of the Supremacy Clause of the United States Constitution, where the federal law with which it is purportedly in conflict expressly provides that it shall not be construed to limit a municipality's authority, as the owner or operator of an airport, from exercising its "proprietary powers and rights" (49 U.S.C. § 1305(b)).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as The Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSEL STEIN, EAST HAMPTON AIRE, INC., and FRANK LAVIGNA,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of the Town Respondents, which consist of Judith Hope, Randall Parsons, Anthony Bullock, Michael J. Finazzo, Hugh King, Charles T. Smith and Russell Stein, and the Private Respondents, which consist of East Hampton Aire, Inc. and Frank LaVigna, in opposition to the

Petition of Montauk-Caribbean Airways, Inc. ("MCA") for a writ of certiorari.

STATEMENT OF THE CASE

The pertinent facts of record are set forth in the opinion of the court of appeals.* However, in light of the arguments advanced in MCA's Petition which were not raised in the lower courts, as well as certain significant developments concerning MCA's pursuit of its claim before the Federal Aviation Administration ("Aviation Administration"), summarized below are the more significant facts.**

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* That opinion is set forth as Appendix D to MCA's Petition for a Writ of Certiorari, dated June 25, 1986 ("Pet."), at pages 31a - 44a.

** The Town Respondents moved in the district court to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and, hence, offered no evidence to

[Footnote continues]

A. The Parties

MCA is a private New York corporation which, for a number of years, has been doing business as an air carrier and fixed base operator ("FBO")* at the

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[Footnote continued]

contradict MCA's allegations concerning their conduct. When MCA moved in the court of appeals for an injunction pending appeal (which was eventually granted by stipulation of the parties), the Town Respondents submitted evidence demonstrating MCA's persistent violations of its lease at the municipal airport at issue in this lawsuit. The statement of facts set forth below is, however, limited to those facts as to which there is no dispute.

* The parties agree that an FBO is a provider of general aviation products, facilities and services at an airport including, among other things, repairs, aircraft fuel, maintenance, tie-downs and parking (Pet., p. 3). It is only with respect to MCA's FBO (as opposed to air carrier) services that it is not permitted to operate year round (Pet., pp. 3-4). With respect to scheduled airline flights, there is no dispute that MCA can and does operate on a year-round basis at the East Hampton airport (Id.).

airport owned and operated by the Town of East Hampton (the "Town"), a summer resort community on Long Island, New York (the "Airport"). Prior to 1979, MCA operated at the Airport on a year-round basis. However, in 1979 MCA's management expressly requested of the Town that it be permitted to change to a seasonal status, and, as a result, since December 1979, MCA has been operating as an FBO pursuant to a lease agreement that is expressly denominated as "Seasonal." The lease defines the parties' rights and obligations by reference to the season of the year, which is divided into the periods from May 1 through September 30 (the "season"), and from October 1 through April 30 (the "off-season").

At all relevant times, respondents Parsons, Finazzo, Bullock and King were duly elected Town councilmen who,

together with respondent Hope, its duly elected Supervisor, constitute the Town's governing body. At all relevant times, Russell Stein was the Town Attorney and Charles Smith was employed by the Town as the Manager of the Airport.

Respondent East Hampton Aire, Inc. is a domestic corporation which, since June 1978, has operated year-round as an air carrier and FBO at the Airport. Frank LaVigna is the chief executive officer of that company.*

B. The Underlying Dispute

In 1983 and again in 1984, MCA decided that it wished to resume operating on a year-round basis, notwithstanding the seasonal lease it had earlier requested. In each of those years, MCA

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* East Hampton Aire, Inc. and Frank LaVigna are collectively referred to herein as "EHA."

attempted to continue its FBO operations at the Airport beyond the last day of the season, but was advised by the Town that continuation of those operations would violate MCA's lease. MCA took no legal action in either of those years to dispute or seek resolution of the Town's position.

Four months after its last request, on February 8, 1985, MCA filed the complaint in this action, alleging violations of the antitrust laws (the Sherman Act, 15 U.S.C. §§ 1, 2 and the Clayton Act, 15 U.S.C. §§ 15, 26); the Federal Aviation Act ("FAA") (49 U.S.C. §§ 1305(a), 1349(a)); and the Civil Rights Act (42 U.S.C. § 1983), the alleged violations of which were premised upon the alleged denial of

rights under the FAA.* The complaint also alleged pendent state claims for breach of contract and conspiracy. As to all pleaded causes of action, MCA sought both damages and injunctive relief.**

C. The Proceedings Below

On March 20, 1985, the Town Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting, as to the antitrust claim, that the

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* As set forth more fully below, while Section 2210 of the AAIA was mentioned in the complaint, MCA expressly disclaimed that it was alleging a cause of action, or seeking relief, under that provision.

** In addition to the federal action, MCA has also filed a suit for damages against the Town in state court, which was dismissed; MCA has moved for reconsideration. The Town commenced a suit against MCA in state court for violations of MCA's FBO lease. That suit was also dismissed, and the Town has filed a notice of appeal.

Town Respondents were immune;* as to the FAA claim, that there was no private right of action under 49 U.S.C. §§ 1305 or 1349(a); as to Section 2210 of the AAIA (which, as noted above, was mentioned in the complaint), that there was no private right of action; and as to Section 1983, that it was unavailable to redress an alleged deprivation of rights under the FAA, because Congress did not intend to create enforceable rights in favor of MCA under that statute, and the FAA's enforcement scheme is so comprehensive that it demonstrates a congressional intent to preclude a Section 1983 remedy.

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* With respect to MCA's claim for antitrust damages, the Town Respondents also argued that the claim was barred under the Local Government Antitrust Act of 1984, 15 U.S.C. § 35. They prevailed on that issue in both the district court and the court of appeals (Pet., pp. 16a-18a; 34a-37a), and MCA has not sought review of that issue in this Court. Hence, the Town Respondents do not address it herein.

MCA opposed the Town Respondents' motion, except insofar as it was directed to Section 2210 of the AAIA. As to that provision, MCA stated the following:

> "However, it appears that defendants have misapprehended the intent of the complaint which makes no claim under 49 U.S.C. § 2210. While reference to that statute is made in the body of the complaint, it is not listed in paragraph 1 of the complaint nor is any relief sought under it. It is therefore unclear why defendants are attempting to establish the absence of a right of action under 49 U.S.C. § 2210 when no such right has been claimed by plaintiff."*

In an order dated May 28, 1985, the district court dismissed the Clayton Act, Civil Rights Act, and FAA claims.**

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* Plaintiff's Memorandum of Law in Opposition to Town Defendants' Motion to Dismiss and in Support of Motion for a Preliminary Injunction, docketed May 8, 1985, p. 14.

** In accordance with MCA's representation that it was not asserting an

[Footnote continues]

On September 4, 1985, after the Town Respondents moved for reargument based upon this Court's decision in Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S. Ct. 1713 (1985) ("Hallie"), the district court dismissed the anti-trust claim for injunctive relief, along with the pendent state claims. In addition, while expressly noting plaintiff's concession that it did not purport to seek relief under Section 2210, the district court noted in dictum that there was no private right of action under that section in any event (Pet., p. 29a).

MCA thereafter appealed the district court's order of dismissal to the United States Court of Appeals for

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[Footnote continued]

action under the AAIA, the district court's May 28 decision did not even address the issue of whether there was a private right of action under that statute.

the Second Circuit which, in a well-reasoned unanimous opinion, affirmed the district court's determination. As to the antitrust claim, the court held that, under the test recently articulated in Hallie, the Town Respondents' conduct was immune from attack under the antitrust laws (Pet., p. 37a-41a). In support, the court cited New York's General Municipal Law § 352 (which authorizes municipalities to enter into exclusive and nonexclusive contracts at airports), and held that this specific delegation of authority declared a state policy that municipal airport operators may enter into lease arrangements which "effectively replace[ ] competition with regulation" (Pet., p. 39a). Hence, the court reasoned, the New York legislature "contemplated the kind of anticompetitive activity in which the Town of East

Hampton has engaged," which was the denial to MCA of a year-round lease (Pet., p. 40a).*

The court next addressed MCA's claims under Sections 1305 and 1349(a) of the FAA, and upheld the district court's determination that, under the well settled legal principles of Cort v. Ash, 422 U.S. 66 (1975), there is no private right of action under either section. As to the Section 1983 claim, the court held, under the reasoning of this Court's decisions in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 28 (1981) ("Pennhurst") and Middlesex County

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* The court did not find, as MCA suggests (Pet., p. 20), that the Town's activities "violate 15 U.S.C. §§ 1 and 2". Rather, the court held that, to the extent the Town's conduct was "anticompetitive," it was done pursuant to statutory permission to regulate, and was therefore immune from the Sherman Act (Pet., pp. 40a-41a).

Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19 (1981), ("Middlesex"), that a Section 1983 action was foreclosed because "[t]he comprehensive enforcement scheme provided in the Federal Aviation Act manifests congressional intent to foreclose an action under § 1983" (Pet., p. 43a), leaving MCA to look to the Aviation Administration, the agency responsible for enforcement of these provisions.

D. The Current Aviation Administration Investigation

After the Second Circuit's decision but before MCA petitioned this Court, on April 21, 1986 the Administration issued an Order of Investigation. Its stated purpose was to determine if the Airport had violated either FAA § 1349(a), or certain of the assurances contained in a grant agreement entered into between the Airport and the Aviation

Administration pursuant to Section 2210's predecessor provision. The Aviation Administration Presiding Officer in these proceedings has ruled that the issues for determination are, among others, whether (and, if so, why) MCA operates at the Airport under terms and conditions other than those applicable to other air carriers and FBO's, including such particular issues as whether there are differences in treatment concerning rental charges and allocation of tie-down spaces. To date documents have been subpoenaed and produced, and four days of testimony on the record have been taken. The investigation is ongoing, and will result in a decsion by the Aviation Administration whether to issue a formal complaint against the Town.*

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* MCA apparently decided to pursue its administrative option in October 1984,

[Footnote continues]

REASONS FOR DENYING THE PETITION

1. In the lower courts, MCA expressly disclaimed that it was seeking relief under AAIA § 2210, the statute for

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[Footnote continued]

and communicated with the Aviation Administration, on an ex parte basis, by forwarding to the agency certain correspondence exchanged between the Town and MCA. The Aviation Administration conducted a preliminary investigation, without the formal participation of the Town, after which a preliminary finding was issued. Some material relating to this investigation is included in the appendix to MCA's Petition. In January 1985, the Town held a public hearing on the issue of MCA's FBO lease, in conjunction with which it received lengthy and comprehensive reports. On February 27, 1985, the Town requested from the Aviation Administration an extension of time until April 30, 1985 to make a determination concerning MCA's lease, and requested a meeting with the Aviation Administration to discuss the matter. By that time, MCA had commenced the instant lawsuit. Contrary to MCA's assertion (Pet., p. 12), the Aviation Administration did not find that the Town was discriminating against MCA; that is the very issue now being considered.

which it seeks review in this Court, and never raised the other issue for which review is sought.

In the district court and in the court of appeals, this case concerned whether a fixed base operator who, having agreed seven years ago to operate on a "seasonal" basis at a municipal airport but is now desirous of operating year-round, may seek that relief in federal court, by suing under FAA §§ 1349(a) and 1305. Both courts determined that there is no private right of action under either provision, a conclusion MCA now concedes was correct (see Pet., p. 14). MCA now shifts gears, and attempts to raise an entirely new issue in its Petition, asserting that this case concerns an alleged violation of Section 2210 of the AAIA, a statute which, by MCA's own concession (see Pet., p. 11), is entirely different from the FAA. Such a cause of

action is nowhere pleaded in the complaint; MCA expressly told the district court it was not asserting such a claim; and MCA never raised the issue on appeal. Hence, the court of appeals never addressed it.

Similarly, with two courts having determined that, under Hallie, the Town Respondents are immune from antitrust attack by virtue of the delegation of authority embodied in New York's General Municipal Law, MCA takes another wholly new tack in its Petition. It now claims that the New York statute must be struck down as violating the Supremacy Clause of the United States Constitution. However, this relief is nowhere mentioned in the complaint, as MCA has itself conceded,* and the issue was not raised

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* The first mention of the Supremacy Clause was in MCA's Petition for

[Footnote continued]

by MCA in the district court or before the panel hearing the appeal; nor was it decided by either court.

2. The decision below announced no novel rule of law, did not signal a conflict in the circuits, and was in all respects correct.

The decision below was fully consistent with the decisions of this Court and all courts of appeals on the issues actually raised by MCA. The Second Circuit's decision did not announce a novel rule of law, address a question of first impression, signal a conflict

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[Footnote continued]

Rehearing En Banc in the Second Circuit, in which MCA sought leave to amend its complaint to incorporate such a claim. See Petition for Rehearing, p. 11 ("At worst, appellant should be granted leave to amend to incorporate claims under the Supremacy . . . clause.")

in the circuits or, indeed, implicate any of the other considerations normally warranting review by this Court. MCA does not claim otherwise but, instead: (i) pleads that the lower court determinations have worked an injustice upon MCA, which can only be righted by this Court; and (ii) urges that this Court should consider, in each and every instance, legal issues nowhere raised below, which MCA has never plead and which, in some instances MCA has expressly disavowed. For the reasons set forth more fully below, neither of these bases merits this Court's review by writ of certiorari.

THERE ARE NO EXCEPTIONAL CIRCUMSTANCES WARRANTING REVIEW OF ISSUES NOT RAISED OR DETERMINED BELOW

As this Court stated in McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940), the Supreme Court

ordinarily does not decide questions not raised or resolved in the lower court. Rather it is only in "exceptional" cases that questions not pressed or passed upon below will be decided. Id. This is not such a case.

I. The Newly Asserted Claims Under Section 2210 of the AAIA and Section 1983

As noted above, MCA did not purport to plead a cause of action under Section 2210. Indeed, it expressly disavowed in the district court that it was seeking relief pursuant to that provision. Hence, in the absence of exceptional circumstances, the existence of a private right of action under Section 2210 should not be reviewed by this Court.

There are no exceptional circumstances here. First, the overwhelming

weight of authority supports the proposition that, under the well settled principles of Cort v. Ash, supra, 422 U.S. 66, and its progeny, there is no private right of action under Section 2210. See Arrow Airways, Inc. v. Dade County, 749 F.2d 1489, 1491 (11th Cir. 1985); Interface Group v. Massachusetts Port Authority, 631 F. Supp. 483 (D. Mass. 1986); Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667 (N.D. Ga. 1982), aff'd 729 F.2d 1467 (11th Cir. 1984). Indeed, respondents are aware of no case holding to the contrary.*

Second, and of equal importance, the Aviation Administration, the

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* The only case relied upon by MCA, New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435 (D. Mass. 1985), did not hold that there was an implied right of action under Section 2210. Although the reasoning of the case is not inconsistent with such a conclu-

[Footnote continues]

agency in charge of overseeing the statutory scheme at issue, is currently investigating the very claims raised by MCA in this Petition. Thus, it is simply not true, as MCA contends, that it is being deprived of an opportunity for adjudication of its rights (Pet., pp. 8-9). Rather, the Aviation Administration, which is now and always has been the proper forum to adjudicate MCA's contentions, will see to it that the federal legislation is enforced.

For all of the foregoing reasons, MCA fares no better under its Section 1983 claim which, for the first

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[Footnote continued]

sion, there is more recent authority in the same district which directly addresses the issue, and which holds, as have all other courts which have considered it, that there is no private right of action under Section 2210. See Interface Group, supra, 631 F.Supp. at 495-96.

time in MCA's Petition to this Court, is premised upon alleged violations of Section 2210 of the AAIA, not the FAA. Unfortunately for MCA, however, the Section 1983 claim was both pleaded (Compl., ¶ 54, Pet., p. 11a) and argued below on the theory that the Town Respondents had violated the FAA. Hence, neither court below ever addressed the issue of the availability of Section 1983 to redress an alleged violation of Section 2210 of the AAIA, and there are no exceptional circumstances warranting this Court to do so as a matter of first impression.*

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* MCA is absolutely wrong when it asserts that the courts below held MCA "could not sustain its cause of action for violations of § 2210 pursuant to 42 U.S.C. § 1983" (Pet., p. 9). In fact, the district court held

[Footnote continues]

Most importantly, under the well-established guidelines set forth by this Court, Section 1983 is not available to remedy an alleged violation of Section 2210, since MCA could not privately enforce that provision. Under the teaching of Middlesex and Pennhurst, Section 1983 is not available to redress an alleged violation of a statutory provision if either: (i) Congress did not intend in that provision to create enforceable

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[Footnote continued]

that MCA could not use Section 1983 to privately enforce Sections 1305 and 1349 of the FAA (Pet., pp. 19a-20a, 27a29a), the only law pursuant to which MCA sought Section 1983 relief. The court of appeals limited its decision to the FAA as well (Pet., p. 43a). Since MCA itself plainly concedes what is obvious -- the FAA and the AAIA are entirely different statutes (Pet., p. 11) -- MCA cannot now seriously argue that the issue which it raises in this Court was in any way pressed or decided below.

rights and obligations in favor of private parties; or (ii) the enforcement scheme of the underlying statute is sufficiently comprehensive so as to demonstrate a congressional intent to preclude the remedy of suits under Section 1983. As MCA concedes, the determination as to the availability of Section 1983 to redress an alleged deprivation of rights under Section 2210 entails the same analysis as the issue of whether there is a private right of action under that section (Pet., p. 10).

Employing the proper analysis, the result is clear. As numerous courts have held, there is no private right of action under Section 2210 because: (1) the section on its face makes clear that its purpose was to fund projects for the "public use", and not to ban discriminatory airport regulation; (2) The section

is structured as a directive to the Secretary of Transportation to receive "assurances" and, therefore, it was not designed to confer a right inhering in individual members of the benefitted class; (3) the legislative history of the provision does not indicate a Congressional intent to explicitly create a private right of action; (4) the AAIA, as a whole, was not intended to provide sanctions but is, instead, a comprehensive statutory system regulating the funding of airports; and (5) the aviation statutes comprise an intricate and comprehensive regulatory and enforcement scheme, which explicitly provides for private remedies only in certain cases, not including this one. See, e.g., Interface Group, supra, 631 F. Supp. at 495-96; Arrow Airways, supra, 749 F.2d at 490-91. Hence, there is simply no basis to conclude that Section 2210,

which may not be privately enforced in its own right, may be privately enforced through the vehicle of Section 1983.*

II. The Newly Raised Constitutional Issue

In Hallie, this Court reviewed its prior decisions concerning the scope of municipal immunity under the antitrust laws, and set forth clear guidelines for the lower courts in deciding such issues. In its Petition, MCA does not take issue

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* The Massachusetts district court decision in New York Airlines, Inc., supra, is the sole authority upon which MCA relies for the newly raised proposition that it may use Section 1983 to rectify an alleged wrong committed under Section 2210. The reasoning of New York Airlines, Inc., is expressly at odds with the same court's later decision in Interface Group, supra, and, we submit, simply cannot be squared with the well-settled line of authority, following Middlesex, which holds that Section 1983 cannot be used where the underlying statute, which was allegedly violated, creates no enforceable rights.

(as it did below) with the applicability of Hallie or the manner in which it was interpreted below.* Instead, MCA now claims that the court of appeals erred since "the New York Law is itself illegal because it runs afoul of the Supremacy Clause . . ." (Pet., p. 17).

This Court should decline to consider that issue for any one of a number of reasons. First, MCA did not raise this issue below, except as an afterthought on its Petition for Rehearing. Even there, MCA sought only "leave to amend its complaint to assert a claim under the Supremacy. . . clause." There

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* Indeed, MCA now seemingly agrees that New York's General Municipal law evinces a legislative intent to replace competition with regulation and, furthermore, that the statute contemplates the kind of "anticompetitive" conduct in which the Town engaged -- entering into particular lease arrangements (Pet., pp. 16-17).

is no reason for this Court to depart from the long-settled principle that it will not decide constitutional issues unless doing so is unavoidable. NAACP v. Alabama, 357 U.S. 449, 459 (1958).

Second, and more importantly, the court of appeals decision was in all respects correct. Under the Hallie test, New York State's explicit delegation of authority to municipalities to enter into exclusive and nonexclusive contracts easily satisfies the requirement of a "clearly articulated" state policy. The Second Circuit's decision was in accord with other courts which have applied that recently articulated test. See, e.g., Interface Group, supra, 631 F. Supp. at 488-90; Rural Electric Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847, 849-59 (10th Cir. 1985); Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d 607,

609-10 (5th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 231 (1985); Cine 42nd Street Theater Corp. v. The Netherlander Organization, Inc., 609 F. Supp. 113, 117-19 (S.D.N.Y. 1985), aff'd 1986-1 Trade Cas. (CCH), ¶67,097 (2d Cir. 1986).

Faced with this body of authority, MCA argues that the General Municipal Law is void on its face, urging that it is in conflict with Section 1305 of the FAA. MCA is wrong, however, because its proposed construction would render one part of Section 1305 -- subsection (b)(1) -- completely nugatory.

MCA's position seems to be that New York's General Municipal Law conflicts with Section 1305(a) of the FAA, which prohibits states and municipalities from enacting or enforcing laws or rules relating to "rates, routes, or services of any air carrier. . . ." What MCA has never come to grips with,

however, is the very next subsection of Section 1305, which excepts from the reach of subsection (a) the right of a "political subdivision as the owner or operator of an airport, . . . to exercise its proprietary powers and rights."

The Second Circuit harmonized the two subsections of Section 1305, and properly concluded that they were not inconsistent with each other. The Second Circuit then correctly held that the Town's actions constituted "valid exercises of the Town's proprietary rights granted under N. Y. Gen. Mun. Law § 352," and that "[t]he preemption statute, § 1305, reserves to the states and local government this power" (Pet., p. 41a). That decision was, we submit, both correct and in keeping with the long-standing rules of construction that statutes are to be construed so as to give effect to

all parts. See, e.g., National Insulation Transportation Committee v. I.C.C., 683 F.2d 533, 537 (D.C. Cir. 1982).*

Finally, we note that all the of these issues are under investigation by the Aviation Administration in its current proceeding. Thus, to the extent some legally cognizable right of MCA is being violated (and we think it is clear

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* In this regard, it is worth emphasizing that there is no dispute that MCA is operating as an air carrier at the Airport on a year-round basis, and the Town has acknowledged its right to do so (Pet., p. 4). Although MCA now strenuously argues that certain FBO services (such as fueling and tie-downs) are, somehow, necessary for MCA to operate as an air carrier (Pet., p. 4-5), it expressly told the court of appeals that this was not an issue in this case. See Petition for Rehearing, p. 8 ("Similarly, the Court's conclusion as to compelling the Town to lease to appellant necessary airline support services bears no relationship to the issues of the appeal . . ."). This is yet another example of MCA's shifting of gears to find some issue which it believes is worthy of this Court's attention.

that none is), MCA will obtain redress in the agency entrusted by Congress with enforcing the very rights MCA claims to have. Surely, there is no need for this Court to reach any constitutional issue in this case regarding such claims.

III. There Are No Reasons Justifying the Grant of MCA's Petition as to EHA.

There was no point for MCA to have included East Hampton Aire, Inc. and Frank LaVigna, the private non-governmental respondents, in its petition to this Court for a writ of certiorari. None of the arguments advanced by MCA for the issuance of a writ is directed against EHA, and even if resolved in favor of MCA, arguendo, would not implicate EHA in any way or involve them in further court proceedings below.

At any rate, there is no basis for the issuance of a writ as to EHA,

since it is clear that MCA's complaint against EHA is insufficient as a matter of law on at least two separate and independent grounds. Its claim is barred by the Local Government Antitrust Act of 1984, which expressly provides that the antitrust immunity accorded to local governments under the Act should also be extended to private parties. It is also barred by the state action doctrine as applied by this Court.

The Second Circuit, therefore, in unanimously affirming the district court correctly concluded that MCA's Clayton Act claim for damages against EHA is barred as a matter of law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition must be denied.

Respectfully submitted,

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